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No. 91-1443

In The

Supreme Court of the United States

October Term, 1991

THOMAS S. MACKIE, d/b/a WARWICK,

Petitioner,

v.

FDIC, As Manager of the
FSLIC RESOLUTION FUND,

Respondent.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The
Fifth Circuit

REPLY BRIEF OF PETITIONER

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RESPONSE TO "QUESTION PRESENTED" SECTION

Respondent recasts the Questions petitioner presented to limit the supposed relevant question to "whether petitioner had a fair opportunity to present his case to the court of appeals and the district court."

To determine the answer to this suggested "ultimate question" you must examine: (i) the cumulative effect of restrictions placed on petitioner and extra opportunities granted respondent's predecessor at the state/district court level; and (ii) the perfunctory and seemingly incomplete review accorded petitioner's appeal by the appellate court.

For details on the perfunctory review accorded petitioner by the Court of Appeals, this Court is respectfully referred to pages 9 through 11 of Petitioner's Petition for Writ Certiorari ("Petition"). Details on the prejudicial treatment of Petitioner by the state and district court which deprived petitioner of a fair trial, through rulings and other actions, (which not only substantially departed from the accepted and usual course of judicial proceedings but also violated petitioner's rights under the Fifth, Seventh and Fourteenth Amendments) appear at pages 11 through 30 of said Petition.

RESPONSE TO "STATEMENT" SECTION
Petitioner's Compliance With Sanctions Order

Regarding the notations on page 3 of the Response regarding monetary sanctions entered against Petitioner and discovery deficiencies, this Court is respectfully referred to the following unchallenged passage from the Petition, at page 18:

> The State Court's denial of discovery was enforced despite the fact that the sanctions had resulted from unauthorized and unwarranted conduct of Mackie's prior counsel, which deficient conduct had been remedied in

full more than a year before the State Court trial. (Emphasis added)

Respondent also notes on page 3 that the State Court order "did not bar petitioner from conducting discovery related to Killeen Savings claims on the note." It was little comfort to petitioner that he could conduct discovery on the elements which Killeen had to establish: amount of note, amount paid on note, amount due - but could not conduct discovery on the only questions of importance to him - the facts on matters which might bar or reduce or completely offset the amount which might otherwise be owing under the note.

District Court's Error of Law on Material Issues

At footnote 4, page 4 of the Response, it is noted that the district court "found that petitioner had failed to raise a genuine issue of material fact regarding several matters: [five listed issues]." The district court did not hold there was insufficient summary judgment evidence; rather it erroneously concluded that, as a matter of law, these issues, if resolved in petitioner's favor, would not constitute defenses to the enforcement or collection of the note. Details regarding this error of law, perpetuated by the Court of Appeals, appear at pages 9 through 18 of the Petition.

RESPONSE TO "ARGUMENT" SECTION

Action of Court of Appeals

At page 5 of the Response, an attempt is made to reduce petitioner's complaint regarding the Court of Appeals' treatment of his appeal to a complaint that no opinion was written. As is explained in more detail at pages 9 through 11 of the Petition

and pages 25 through 35 of the appendix portion of the Petition, it was the lack of understanding of petitioner's positions on critical issues, as demonstrated by statements of the panel at oral argument combined with the rapid decision and lack of written opinion, which are relied on to demonstrate that the Court of Appeals treated this case as it has virtually all others involving federal financial regulatory agencies: uphold the government's position unless it involved a clear error that could not be rescued by a sympathetic court.

Order Limiting Petitioner's Discovery Rights

At page 7 of the Response, it is asserted that by failing to separately move to modify or vacate the State Court order limiting discovery, petitioner waived any complaint regarding same. In the same section it states first, at footnote 6 that there is no indication in the record that the district court was informed about the payment of sanction ordered until petitioner's motion for new trial and then continues on the same page to note correctly that everything done in state court is deemed to be done by district court (which presumably would include knowledge of the statement made as part of the record at the beginning of the State Court trial regarding full compliance with discovery deficiencies and payment of attorneys fees more than a year before case proceeded to trial (See App. pp 23-24, Petition.)

Also, this Court is respectfully referred to the following unchallenged passage from page 20 of Mackie's Petition herein:

> Mackie called upon the District Court twice (in his Brief in Support of his Response to the FDIC's Motion for Summary Judgment and in his Motion for Reconsideration and for New Trial) to relieve him of the unwarranted handicap which the State Court's Order of September 14, 1987 constituted to his efforts to defend himself and prosecute his counterclaim.

Finally, it is obvious the district court was aware of the State Court Order, and wrongfully chose to continue it in effect, by the otherwise unexplainable language in its Amended Order of August 22, 1990 (Append. pp. 19-20, Petition):

> Discovery shall be reopened for the limited purpose of conducting discovery on the disputed interest rate calculations.

Denial of Petitioner's Right to Jury Trial on Attorneys' Fees

At page 8 of the Response, it is suggested that since this was not presented as a separate question, this court need not decide it. This is, of course, wrong. The complaints regarding the errors of law made by the courts below on the attorney's fees question is one of four illustrations of the district court actions which were affirmed summarily by the Court of Appeals, which demonstrate the extent to which petitioner was denied a fair trial (part of petitioner's first question). The proper amount of attorney's fees to be awarded is also one of the matters with respect to which petitioner was:

> denied a jury trial on issues which he has raised by competent summary judgment proof, and thus has been

> unfairly deprived of property without due process of law, and been denied the equal protection of the laws of the State of Texas and of the United States of America.

which quote appears pages 29 through 30 of the Petition as part of Petitioner's second question presented. This is therefore an important element of petitioner's claim which should be addressed by this Court.

CONCLUSION

For the reasons stated herein, and in the Petition, the Petition should be granted.

Respectfully submitted,

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